We were referred to no contrary decision of any Court in the Straits Settlements or in the Federated Malay States where the law on the point is the same and following those cases, we hold that as the three criminal breaches of trust charges being offences of the same kind committed within a year could be tried together, and as the charges subsidiary to each criminal breach of trust charge could be tried with that charge, all ten charges can be tried together.

This occasions no injustice. The mischief at which the legislature aims in forbidding misjoinder is prejudice to the prisoner by confusion of issues and by introducing evidence of other offences tending to shew bad character. But this mischief does not arise where the evidence of other offences is introduced in order to prove—not that the accused is of bad character, but that he committed the offence with which he is charged.

The falsifications and forgery in group C were part of the evidence that the accused had committed criminal breach of trust of $807.83 on the 19th April, 1938.

We think too that each group is really one charge whether the offences are charged cumulatively or alternatively and that section 166 applies.

That being so we think that even had there been convictions on all ten charges there should not have been more than three cumulative sentences, in this case one for each criminal breach of trust which was the crime to which the others related.

The third criminal breach of trust might have been more heavily punished than the others if forgery was one of the means used to perpetrate it.

As regards the facts of the case, there was abundant evidence to establish the appellant's guilt on the three charges of criminal breach of trust. The trial judge, in his grounds of judgment, sets out very clearly such evidence, both oral and documentary, and there is no need for us to refer to it.

In view of what we have previously stated, the sentences on the 3rd and 4th charges will be concurrent and not consecutive. Subject to this variation of the sentence the appeal is dismissed.

Appeal dismissed. Sentence on subsidiary charge varied to run concurrently with sentence on main charge.

[APPELLATE CRIMINAL JURISDICTION]

HORNE, J.

February 13, 1940.

CHAN HO SIEW v. PUBLIC PROSECUTOR.

[RAUB CRIMINAL APPEAL]

Criminal Procedure Code, Ss. 302 (i) and 261—conviction—what constitutes—recording plea of guilty insufficient—continuation of proceedings before another Magistrate.

The appellant pleaded guilty to five separate charges under the Food Control Enactment (No. 21 of 1939). The Magistrate recorded "Plea accepted. Convicted. To 30th December, 1939, for sentence."

On the 30th December, 1939, the date fixed for sentence, the appellant was again charged with the same offences before another Magistrate. Evidence was taken and the accused was convicted and sentenced. The second Magistrate was not aware that the case had been before another Magistrate. On appeal.

Held, as regards second proceedings there had been no previous conviction. A conviction must include both an adjudication or finding of guilt and sentence.

Nevertheless the proceedings having been partly dealt with by one Magistrate, it was not competent for another Magistrate to deal with them except in a case clearly coming within the provisions of Section 261 of the Criminal Procedure Code. As the second Magistrate was not aware that the case had been before another Magistrate, the presumption of regularity could not be drawn. The second trial should not have been held and was a nullity.

MAGISTRATES CRIMINAL APPEAL.

E. Jeff for appellant.

There have been two convictions and the proceedings are contrary to section 261 and 302 of the Criminal Procedure Code. The Court should express its disapproval by refusing a re-trial. This is not a grave case and does not call for extreme penalties.

T. D. Wallace, Deputy Public Prosecutor, for the respondent.

The continuation of proceedings by another Magistrate is permissible under section 261 of the Criminal Procedure Code. The maxim "Omnia rite esse acta" applies. "Conviction" under section 302 of the Criminal Procedure Code means verdict plus sentence.

Horne, J.—The appellant was charged with five separate charges under the Food Control Enactment. He appeared at Temerloh before Che Saaidin Khadri, a first class Magistrate, on the 27th December, and admitted the offences. He stated he fully understood the consequences of his plea. The Magistrate then recorded: "Plea accepted. Convicted. To 30th December, 1939, for sentence."

On the 30th December, 1939, the appellant was charged again before Mr. Gregg, another first class Magistrate, and stated with respect to each of the same five charges:—

> "I admit selling at prices above the maximum but I incurred expenses in bringing the goods to the estate."

No plea of guilty was recorded on these admissions under section 173 (f) of the Criminal Procedure Code, but Mr. Kemp the Chief Police Officer, Pahang, was then affirmed and gave evidence. It was then recorded that the accused had no questions to ask and nothing to say except: "I did not stop the coolies going outside to buy."

The Magistrate then records "Accused convicted", and Mr. Kemp addressed him on the question of sentence. The appellant was then sentenced. The appellant appeals against conviction of the 30th December.

Mr. Jeff's first submission on his behalf is that there have been in fact two separate trials of the same charges, and that the second one is therefore a nullity. He submits also that the appellant ought not to be sent back to the first Magistrate and be further harassed. This submission is based on the assumption that the appellant had suffered a previous conviction.

The word "conviction" may either mean "a verdict which is held to warrant a judgment" as where sentence is postponed; or "a verdict actually followed by a judgment." For the purpose of applying section 302 (i) "conviction" in that section can only have the latter of these two meanings.

Mr. Wallace directs my attention to section 173 (m) (2) of the Criminal Procedure Code from which I think it must be intended that a conviction must include both an adjudication or finding of guilt and a sentence.

Of course in a trial by jury the two elements of a finding and sentence comprising a conviction is clear enough, because the jury are responsible for the finding or verdict and the Judge imposes the sentence. It would however be impossible to prove "a conviction" in a Magistrate's Court without having a certificate showing the particulars noted by the Court as required by section 176 (i) (f) and (h) and 176 (ii) (f) and (g), i.e., the finding and the sentence.

That ground of appeal must fail.

Nevertheless in the circumstances I do not think the Magistrate who dealt with the matter on the 30th had any jurisdiction in the matter at all.

Mr. Wallace submits that section 261 permits the second Magistrate to conclude a matter partly heard or to re-open and then conclude a matter partly heard. In my view, once a Magistrate has taken cognizance of an offence or a series of offences capable of being joined in one trial, no other Magistrate can deal with the matter except in a case clearly coming within the provisions of section 261. The general principle is that a Court which convicts an accused person should ordinarily act only on evidence heard by itself.

The material part of section 261 is as follows:—

> "261. Whenever any Magistrate after having heard and recorded the whole or any part of the evidence in an inquiry or a trial ceases to exercise jurisdiction therein and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself, or he may re-summon the witnesses and recommence the inquiry or trial."

It provides for one Magistrate ceasing to act and another succeeding him. There is nothing on the record to show that Che Saaidin Khadri ceased to act (no illness, nor transfer or pressure of work is recorded) nor is there anything to show that he had been succeeded by Mr. Gregg. Mr. Wallace urges me to adopt a construction of this section which, in my opinion, upon the information before me would result in two Magistrates simultaneously having cognizance of the same charges against one accused person. I cannot adopt that construction.

I would be entitled to presume that everything was in order, that one Magistrate has ceased to have jurisdiction and had been succeeded by another, even in the absence of a record of the fact; but the second Magistrate states in his grounds of judgment that it was only when he received the notes of evidence he realized that the accused had already been convicted before another Magistrate. I cannot draw the presumption of regularity when the succeeding Magistrate does not even know there had been another Magistrate in the case.

I am therefore of opinion that the second trial, which is in fact a separate trial, should not have been held and it is in my opinion a nullity.

I shall therefore set aside the convictions of that date.

This leaves the appellant's original pleas of guilty to stand no sentence imposed. I am asked to impose no sentence on the ground that the appellant has been sufficiently harassed by the duplication of proceedings and that the gravity of the offence has been exaggerated.

The latter ground depends upon the evidence. Strictly speaking it would be right to remit the matter back to the Court which took the pleas and order that the matter should continue from the point it reached on the 27th December, but it is suggested that it will be more convenient if I fix the fines myself.

Before doing so there is the point of misjoinder. I do not think that section 164 of the Criminal Procedure Code applies but that the case falls within section 165 of the Criminal Procedure Code. The four charges of offering for sale are a series of acts constituting one transaction: that is the offer of the four kinds of goods is made at the one place and at the one time. The fifth charge can be joined to these because it is a charge of the same kind. But in any event if this additional charge is a misjoinder no injustice has been caused by it.

The gravity of the offence I have to consider in the light of the grounds of judgment, the recorded evidence of Mr. Kemp, the statements of the accused, the four changes in maximum prices in the last three months prior to the offence and the dispute among the labourers. It is only right that the fines should be substantial but not in the circumstances disclosed that they should reach anywhere near the permitted maximum. I accordingly reduce them.

I reduce the first fine of $750 to $250, the second fine of $500 to $200, the third fine of $300 to $200, the fourth fine of $300 to $200, and the fifth fine of $50 may stand.

Fines reduced accordingly. Excess paid ordered to be refunded.

[APPELLATE CRIMINAL JURISDICTION]

MURRAY-AYNSLEY, J.

February 24, 1940.

ALI BIN YUSOF v. PUBLIC PROSECUTOR.

[PERAK CRIMINAL APPEAL]

Minor Offences Enactment (Cap. 46)—Sec. 35 (i)—Possession of Property reasonably suspected of being stolen—Evidence—Accuseds' character.

The appellant, a well known public character from the Police point of view, was found trying to pawn a paper umbrella worth a few cents. He was arrested, tried and convicted under Section 35 (i) of the Minor Offences Enactment which reads as follows:—

> 35 (i) Any person who has in his possession or conveys in any manner anything which may be reasonably suspected of being stolen or fraudulently obtained shall, if he fails to account satisfactorily how he came by the same, be liable to a fine of fifty dollars, or to imprisonment for three months.

Held, that the character of the accused, by itself, is not sufficient to raise reasonable grounds for suspicion that the property has been stolen.

MAGISTRATE'S CRIMINAL APPEAL.

Appellant in person.

T. V. A. Brodie for Public Prosecutor.

Murray-Aynsley, J.—In this case the appellant was charged under section 35 (i) of Cap. 46.

The appellant, a well known public character from the Police point of view, was found trying to pawn a paper umbrella worth a few cents. When the Enactment refers to something reasonably suspected of being stolen, I think, that the suspicion must be based on something more than the character of the accused, which may be such that the possession of anything at all gives to suspicion.

In the present case, apart from the character of the appellant, I do not think that there was anything at all to give rise to suspicion. In these circumstances I consider that the conviction must be quashed.

Appeal allowed. Conviction quashed.

JOHORE REPORTS.

[APPELLATE CRIMINAL JURISDICTION]

LAVILLE, J.

September 12, 1940.

ONG SIEW SWEE v. PUBLIC PROSECUTOR.

[JOHORE BAHRU CRIMINAL APPEAL No. 14 of 1940]

Motor Vehicles — Overloading — conditions of licence — trailer a carriage — No power to license carriage — Traction Engines and Motor Cars Enactment, Section 4 (i).

The appellant had been convicted on a charge, brought under Section 4 (i) of the Traction Engines and Motor Cars Enactment of having used a trailer other than in conformity with the terms of its licence relating to maximum load.

Held on appeal (1) Section 4 (i) does not, by itself, make it an offence to use a licensed traction engine or motor car in a manner contrary to the terms of its licence, and (2) that, in any event, a trailer is a carriage and is not affected by the provisions of Section 4 (i). **Obiter:** the Enactment confers no power to make rules for the licensing of carriages, and the rules relating thereto are, therefore, **ultra vires.**

MAGISTRATE'S CRIMINAL APPEAL.

The facts and arguments sufficiently appear from the Judgment.

Chandran for Appellant.